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Daniel Boucher, by and through his Guardian, Tola Boucher, an individual, and James Boucher, an individual v. IHC Hospitals, Inc., dba Dixie Medical Center, Edward Foxley, M.d., David Moore, M.d., Kathy Marshall, R.N., and Does 1 through 20, inclusive : Brief of Respondent

Utah Supreme Court

Charles W. Dahlquist II; Larry R. White; Kirton, McConkie & Poelman; David W. Slagle; Larry R. Laycock; Snow, Christensen & Martineau; attorneys for defendant.
Irwin M. Zalkin; Tom Rasmussen; Hatch, Morton & Skeen; attorneys for plaintiffs.

BRIEF

900476

CKET NO:

IN THE SUPREME COURT OF THE

STATE OF UTAH

DANIEL BOUCHER, by and through his Guardian, TORLA BOUCHER, an individual, and JAMES BOUCHER, an individual,

Appellants,

vs.

IHC HOSPITALS, INC., dba DIXIE MEDICAL CENTER, EDWARD FOXLEY, M.D., DAVID MOORE, M.D., KATHY MARSHALL, R.N., and DOES 1 through 20, inclusive,

Respondents.

Case No. 900476
Priority No. 16

BRIEF OF RESPONDENTS

APPEAL FROM A RULE 54(b) FINAL ORDER OF THE FIFTH JUDICIAL DISTRICT COURT, STATE OF UTAH

Irwin M. Zalkin
LAW OFFICES OF IRWIN M. ZALKIN
1143 Tenth Avenue
San Diego, CA 92101

Thomas Rasmussen
HATCH, MORTON & SKEEN
1245 Brickyard Road, Suite 600
Salt Lake City, UT 84106

Attorneys for Plaintiffs/ Appellants

DAVID W. SLAGLE
LARRY R. LAYCOCK
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th floor
P.O. Box 45000
Salt Lake City, UT 84145
Attorneys for Defendant/ Respondent David W. Moore, M.D.

CHARLES W. DAHLQUIST, II
LARRY R. WHITE
KIRTON, McCONKIE & POELMAN
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Attorneys for Defendants/ Respondents IHC, Inc., et al.

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DAVID W. SLAGLE
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P.O. Box 45000
Salt Lake City, UT 84145
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LARRY R. WHITE
KIRTON, McCONKIE & POELMAN
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
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APPEAL FROM A RULE 54(b) FINAL ORDER OF THE FIFTH JUDICIAL DISTRICT COURT, STATE OF UTAH

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Whether this Court will assume the correctness of the lower court's judgment where, as here, Appellants fail to cite the record to support their contentions on appeal?

II. Whether the lower court properly dismissed Appellants' claims for negligent infliction of emotional distress pursuant to Restatement (Second) of Torts § 313 and current Utah authorities, which uniformly apply a zone-of-danger standard of recovery?

III. Whether the lower court properly dismissed Appellants' claim for loss of filial consortium in connection with a nonfatal injury because no such claim is recognized under Utah law?

DETERMINATIVE RULES, STATUTES AND AUTHORITIES

The determinative statutes and Rules are: (1) Utah Code Ann. §§ 78-11-6, 78-11-7 (1953, as amended); (2) Utah Const. art. XVI, § 5; (3) Restatement (Second) of Torts § 313 (1965) and its accompanying comments, a copy of which is attached hereto as Addendum "A"; and (4) Rule 24(a)(6), Utah Rules of Appellate Procedure;

The determinative case authorities are: (1) Trees v. Lewis, 738 P.2d 612, 613 (Utah 1987); (2) Johnson v. Rogers, 763 P.2d 771 (Utah 1988); (3) Dalley v. Utah Valley Regional Medical Center, 791 P.2d 193, 200-01 (Utah 1990); (4) White v. Blackburn, 787 P.2d 1315, 1318 (Utah App. 1990); (5) Hackford v. Utah Power & Light Company, 740 P.2d 1281 (Utah 1987); and Dralle v. Ruder, 529 N.E.2d 209 (Ill. 1988).

STATEMENT OF THE CASE

A. Nature Of The Case:

This is a medical malpractice action arising out of alleged negligence in the treatment and care of Daniel Boucher, in which Daniel's parents, James and Torla Boucher assert claims to recover for (1) negligent infliction of emotional distress; and (2) loss of filial consortium.

B. Course Of Proceedings And Disposition By The District Court:

1. Plaintiffs/Appellants ("Appellants") filed a complaint alleging medical malpractice against the defendants-Respondents (Respondents) in the Third Judicial District for Salt Lake County on October 25, 1989. (Record (R.) at 5-16.) Respondents moved for change of venue. Their motions were granted on January 29, 1990, and the case was transferred to the Fifth Judicial District for Washington County.

2. Respondent David Moore answered the Complaint. (R. at 17-25.) However, Respondents Dixie Medical Center, a division of IHC Hospitals, Inc., David Foxley, M.D., and Kathryn Marshall, R.N. (Hospital Respondents), in response to the Complaint, filed a Motion to Dismiss on December 7, 1989, and requested that the Appellants' second and third causes of action be dismissed. (R. 81-82.)[1]

3. Respondent David Moore filed a motion to dismiss on the identical grounds as the Hospital Respondents on March 5, 1990. (R. 180-183.)

4. Judge J. Philip Eves considered the motions, briefs and oral argument of the parties and entered his Order on May 23, 1990, a copy of which is attached hereto as Addendum "B," dismissing Appellants' second cause of action holding that the allegations of

[1]The basis of this motion was that the second cause of action (1) sought damages for Torla Boucher and James Boucher's loss of consortium with their son, Daniel Boucher, and (2) claimed damages for negligent infliction of emotional distress and damages incurred by Torla and James Boucher in viewing their quadriplegic son. The third cause of action sought hedonic damages. (R. at 5-16.)

James and Torla Boucher for negligent infliction of emotional distress and loss of consortium with their child failed to state any claim. (R. 302-304.)[2]

5. Appellants filed their notice of appeal from the May 23, 1990 interlocutory order on June 18, 1990. (R. 305-306). The Supreme Court noted the filing on June 25, 1990 (R. 307) and assigned Appellate Court No. 900299. The appeal was later dismissed and remitted to the Fifth Judicial District Court on August 27, 1990, for the reason the appeal was not taken from a final judgment. (R. 318.)

6. On September 26, 1990, the trial court certified the order of dismissal for appeal pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, a copy of which is attached as Addendum "C." (R. 332-334.) Appellants filed a second notice of appeal on October 1, 1990. (R. 341-342.)

C. Statement of Facts:

The Statement of Facts contained in Appellants' Brief goes beyond the Record and reasonable inferences which might be made therefrom. Therefore, Respondents offer the following facts to accurately present and clarify the Record.

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[2]The judge also dismissed the third cause of action for hedonic damages because it was encompassed by Appellants' first cause of action. The portion of the order dismissing the third cause of action is not a subject of this appeal, having been conceded by Appellants.

1. Late in the evening on June 1, 1987, Appellant Daniel Boucher ("Daniel"), 18 years old and not a minor,[3] was throwing homemade bombs made of Co_2 cartridges from the Man-of-War Bridge near St. George, Utah. One of the bombs exploded prematurely, seriously damaging Daniel's right hand. He was taken to Dixie Medical Center and Dr. David Moore performed surgery on the hand on June 2, 1987. (R. at 5-10.) See Addendum "D."

2. Appellants claim that sometime during the early morning of June 3, 1987, Daniel suffered an event, involving respiratory difficulties, which resulted in loss of consciousness. When he awoke, he was in a quadriplegic state. (R. at 5-16.)

3. Daniel's parents ("Torla and James Boucher") assert that they are entitled to recover for negligent infliction of emotional distress arising out of the alleged negligence in care and treatment rendered on behalf of a third person, their son. (R. at 5-16, Plaintiff's Complaint at ¶¶ 24-25.)

4. James and Torla also claim that they are entitled to recover for alleged loss of filial consortium as a separate claim and component of damage due to the nonfatal injury to their son. (R. at 5-16 and Plaintiffs' Complaint at ¶¶ 26-27, attached hereto as Addendum "E.")

5. It is undisputed that James and Torla Boucher did not observe the incident involving respiratory difficulties or other injury causing event to Daniel Boucher at the time he experienced

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[3]Medical records indicate his date of birth is June 11, 1968. See Addendum "D". See, also, Appellants' Brief, Statement of Facts, at p. i.

them at approximately 4:30 a.m. on June 3, 1987. It is also undisputed that James and Torla Boucher were not patients of Respondents or in any other way threatened with emotional distress from medical treatment that was by its very nature directed at them. (R. at 69-80.)

6. Likewise, it is undisputed that James and Torla Boucher were not threatened with emotional distress likely to result in bodily harm because of fright, shock or other emotional disturbance arising out of fear for their own safety or invasion of their own similar interests. (R. at 71-73.)

SUMMARY OF THE ARGUMENT

The focus of Respondents' Argument is upon Appellants' failure to state any recognized theory of recovery for either negligent infliction of emotional distress or loss of filial consortium in connection with a nonfatal injury under the facts of this case and pursuant to applicable Utah laws.

In addition, however, significant procedural defects also independently justify affirmance of the judgment of dismissal in favor of Respondents as a matter of law. Appellants have completely failed to cite the Record on Appeal and thus, this Court should assume the correctness of the judgment below.

The claim of Torla and James Boucher for negligent infliction of emotional distress fails as a matter of law. Appellants completely ignore the zone-of-danger rule adopted by this Court as the standard for recovery of damages. Accordingly, Appellants' arguments on appeal are inapplicable in Utah. Moreover, even under

the more liberal standards of recovery, now clarified by recent California Supreme Court decisions, no recovery may be had for negligent infliction of emotional distress. First, Appellants were never in any zone-of-danger created by allegedly negligent medical treatment. Second, James and Torla Boucher were not present at the scene of the injury-producing event at the time it occurred and were not then aware that it was causing injury to their son Daniel. Under these circumstances, there can be no recovery for negligent infliction of emotional distress under any theory advanced by Appellants.

For several reasons, neither can there be recovery for loss of filial consortium in the instant case. First, Daniel Boucher is not a minor and Utah Code Ann. § 78-11-6 (1953, as amended) has no application to his parents. Second, the provisions relating to wrongful death, including Utah Code Ann. § 78-11-7 (1953, as amended) and Utah Const. art. XVI, Sec. 5, both deal with the death of an individual and have no application to the claims of Appellants. Finally, a cause of action for loss of filial consortium is fraught with numerous difficulties, including (1) the absence of the right to recover damages for loss of spousal or parental consortium in the case of nonfatal injuries; (2) the invasion of the legislature's prerogative; (3) unnecessary and burdensome expansion of relief to tangential relatives; and (4) confusion of the trier of fact on issues of damages.

For these reasons, the order dismissing plaintiffs' claims for negligent infliction of emotional distress and loss of filial consortium should be affirmed.

ARGUMENT

POINT I

> THIS COURT SHOULD ASSUME THE CORRECTNESS OF THE JUDGMENT BELOW BECAUSE APPELLANTS FAILED TO REFER TO ANY PORTION OF THE RECORD THAT FACTUALLY SUPPORTS THEIR CONTENTIONS ON APPEAL.

This Court has consistently held that it will assume the correctness of the judgment below, where, as here, Appellants do not support facts set forth in their Brief with citations to the Record. Trees v. Lewis, 738 P.2d 612, 613 (Utah 1987); and State v. Tucker, 657 P.2d 755, 756-57 (Utah 1982). For example, in State v. Tucker, this Court concluded that:

> A separate and independent basis for the affirmance of the trial court is that the defendant failed to refer to any portion of the Record that factually supports his contention on appeal.

In the instant case, Appellants offer absolutely no factual support for their contention that the lower court improperly entered judgment against Appellants on the issues of negligent infliction of emotional distress and filial consortium. Rather, Appellants' cited authorities and the accompanying fact statement clearly demonstrate that the judgments of the lower court were in keeping with the laws governing negligent infliction of emotional distress in Utah and the lack of a cause of action for filial consortium.

Appellants also mistakenly assume that deficiencies in their pleadings and/or arguments before the trial court can be remedied at this stage of the proceedings. Indeed, at page 16 of their Brief, Appellants "request that the [Supreme] Court grant leave to amend the complaint to more properly and fully state the allegations of the direct-victim liability." This contention and request is not only improperly raised before this Court, but may not be considered on appeal.

This Court has forcefully and consistently held that it will not consider issues raised for the first time on appeal. Sorenson v. Larsen, 740 P.2d 1336 at n.1 (Utah 1987); Topik v. Thurber, 739 P.2d 1101, 1103 (Utah 1987); Insley Manufacturing Corp. v. Draper Bank & Trust, 717 P.2d 1341, 1347 (Utah 1986). In summary, Bouchers have demonstrated their intention to abandon any pending efforts to modify their claims before the trial court by pursuing this appeal without first securing a ruling from the trial court.

POINT II

THE CLAIM OF TORLA AND JAMES BOUCHER FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS FAILS AS A MATTER OF LAW

A. Utah Has Adopted the Zone-Of-Danger Rule As Its Standard For Recovery For Negligent Infliction Of Emotional Distress.

In Johnson v. Rogers, 763 P.2d 771 (Utah 1988), this Court recognized a cause of action for negligent infliction of emotional distress.[4] However, it was careful to select a standard of

[4] Previously, in Reiser v. Lohner, 641 P.2d 93 (Utah 1982) and Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961), the Utah (continued...)

recovery that would effectively balance the needs of tort victims in seeking redress for legitimate injuries, while providing a reasonable and predictable limit on recovery. Contrary to Appellants' mistaken reliance on a broad "survey of the law of other states," which could be satisfied by the specific facts of the Johnson decision, it is the Concurring Opinion of Justice Zimmerman, which states the majority view and determinative test for liability for negligent infliction of emotional distress.[5]

This Court's opinions firmly state, without equivocation, that Utah's test for imposition of liability for negligent infliction of emotional distress is contained in the "zone-of-danger" standard set forth in Section 313 of the Restatement (Second) of Torts (1965), as explained in the Comments accompanying that section.

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[4](...continued)
Supreme Court had rejected, without analysis, a claim for emotional distress to the parents of a child damaged by allegedly negligent medical treatment: " [I]t is well established in Utah that a cause of action for emotional distress may not be based upon mere negligence."

[5] Justice Zimmerman declared that:

> "I agree that this cause of action does exist in Utah, as the trial court held. However, I depart from Justice Durham with regard to the legal standard by which such a cause of action is to be defined in Utah. Her opinion surveys the law of other states--a helpful exercise--but it declines to choose from among the various possible rules because all seem satisfied in this case. If we were to do no more, courts and counsel would be left entirely without satisfactory guidance in dealing with all cases but the present one.

Justices Hall, Howe and Stewart concurred in the opinion of Justice Zimmerman. Johnson, 763 P.2d at 785.

Johnson, 763 P.2d at 785. Pertinent portions of Section 313 provide as follows:

> (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
>
> > (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person and
> >
> > (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.
>
> (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other. (emphasis added).

Restatement (Second) of Torts § 313 (1965).

Since its acknowledgement of a cause of action for negligent infliction of emotional distress, this Court has consistently applied the Restatement "zone-of-danger" rule as the standard for recovery. See Dalley v. Utah Valley Regional Medical Center, 791 P.2d 193, 200-01 (Utah 1990); and White v. Blackburn, 787 P.2d 1315, 1318 (Utah App. 1990).

In Dalley, a patient brought a medical malpractice action against her physician, among others, for a burn injury to her leg which allegedly occurred while she was undergoing a caesarean section delivery. Part of the patient's damage claim was based upon a demand for recovery arising out of negligent infliction of emotional distress and reliance upon the decision in Johnson v. Rogers, 763 P.2d 771 (Utah 1988). In addressing the patient's

claim, this Court noted that Dalley was distinguished from Johnson for the reason that the plaintiff in Dalley "did not witness the injury itself." Dalley, 791 P.2d at 201. This Court, relying on the "zone-of-danger" standard of recovery, further held that: "[A]wards for negligently inflicted distress arise when physical or mental illness results from the emotional trauma itself." Id.

In White v. Blackburn, 787 P.2d 1315, 1318 (Utah 1990), the Utah Court of Appeals explained that:

> [T]he Utah Supreme Court, in Johnson v. Rogers, 763 P.2d 771, 782 (Utah 1988), recognized that such an action may be maintained, but the main opinion did not articulate clear-cut guidelines for recovery. Justice Zimmerman, in a concurring opinion joined by the other justices, thus forming a majority of the court, set forth the standards enunciated in section 313 of the Restatement (Second) of Torts (1965) as the test for determining liability for the negligent infliction of emotional distress. Id. at 785

Appellants completely ignore this accepted Utah rule of law, apparently conceding the fact that they cannot recover thereunder, based upon the circumstances of this case. In addition, Appellants not only misapprehend the appropriate standard of recovery, but also improperly suggest that the Johnson decision is "premised" upon "California Supreme Court decisions," which Appellants mistakenly contend allow them recovery "either as direct victims, and/or as bystander victims." (Appellants' Brief at p. 10.) These contentions emphasize Appellants' misunderstanding of the newly recognized cause of action and the decisions governing its application in Utah.

First, the Johnson decision, as it relates to the majority rule governing negligent infliction of emotional distress, was not

premised on any California Supreme Court case. Johnson, 763 P.2d at 785. Second, Utah decisions relative to the issue of negligent infliction of emotional distress clearly rely on the Restatement zone-of-danger rule of recovery, which Appellants choose to ignore. Finally, both Justice Durham's opinion and that of Justice Zimmerman agree that there can be no recovery by bystanders under the Utah "zone-of-danger" rule. In summary, Appellants fail to address the applicable rule of law in Utah and further fail to justify the application of any other expanded theories of recovery.

B. The Claims Of Torla And James Boucher Are Insufficient To Satisfy The Utah Zone-Of-Danger Standard Of Recovery.

It is clear that the claim of Torla and James Boucher for negligent infliction of emotional distress relates solely to alleged negligence with respect to care and treatment of their son, Daniel Boucher or, in other words, alleged potential for harm and peril to a third person. In the instant case, Torla and James Boucher were simply not within their son's "zone of danger." Indeed, to be within the zone of danger, the Bouchers would have had to be subject to the same allegedly negligent medical treatment which they contend caused injury to their son. Johnson, 763 P.2d at 785. No such facts are present in the instant case.

It is likewise undisputed that no conduct of the defendants threatened either Torla or James Boucher with bodily harm, fright, shock, or other emotional disturbance, arising out of fear for their own safety or the invasion of their own similar interests, except because of the alleged peril to their son. Under these

circumstances, Mr. and Mrs. Boucher have no right of recovery for negligent infliction of emotional distress because: (1) the defendant's alleged medical negligence was not, by its very nature, directed at Mr. and Mrs Boucher; (2) Torla and James Boucher were, at best, bystanders and not direct victims in this case for the reason that they were not even in the hospital at the time Daniel suffered the alleged injury causing event; and (3) the alleged invasion of the Bouchers' interests is vicarious and only arises because of alleged peril to a third person, their son.

Finally, bystander and other expanded theories of recovery for negligent infliction of emotional distress are inapplicable under Utah law. In Johnson, the opinion of Justice Durham reviews the various standards of liability, all of which seemed to allow recovery under the specific facts in Johnson. The opinion of Justice Durham then observes the following limitations inherent in the "zone-of-danger" rule which was adopted by this Court:

> States [such as Utah] that have adopted a zone-of-danger rule have, in effect, limited recovery to cases involving direct victims, disallowing recovery to bystanders. Plaintiffs who are allowed to recover because they were present within the zone-of-danger are direct victims because the defendant breached the duty of care owed them. Other witnesses falling outside of the zone are denied recovery due to the lack of direct injury and breach of a duty. (Emphasis added).

Johnson, 763 P.2d at 781-82. The notes accompanying Section 313 are helpful in defining the zone of danger by distinguishing between bystanders and direct victims.

Comment (d) to Section 313 articulates some differences between bystander and direct victim liability:

> The rule stated in Subsection (1) applies only where the negligent conduct of the actor threatens the other with emotional distress likely to result in bodily harm because of the other's fright, shock, or other emotional disturbance, arising out of fear for his own safety, or invasion of his own interests. It has no application where the emotional distress arises solely because of harm or peril to a third person, and the negligence of the actor has not threatened the plaintiff with bodily harm in any other way.
>
> Thus, where the actor negligently runs down and kills a child in the street, and its mother, in the immediate vicinity, witnesses the event and suffers severe emotional distress resulting in a heart attack or other bodily harm to her, she cannot recover for such bodily harm unless she was herself in the path of the vehicle, or was in some other manner threatened with bodily harm to herself otherwise than through the emotional distress at the peril to her child. [6] (emphasis added).

Accordingly, James and Torla Boucher like the parent in Comment (d) cannot recover unless they were themselves subject to negligent medical treatment or threatened with bodily harm from such treatment other than through the emotional distress at the peril to their son.

Other courts which have adopted the "zone-of-danger rule" consistently deny recovery to individuals, who like the Bouchers, are not direct victims as defined by the Restatement rule. For example, in Maloney v. Conroy, 545 A.2d 1059, 1062-64 (Conn. 1988), the court addressed the issue as to whether the daughter of a victim of alleged malpractice may recover for a severe emotional

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[6] These comments to Section 313 were expressly adopted by the Utah Supreme Court. Johnson, at 763 P.2d at 785.

disturbance claimed to have resulted from observing acts of malpractice perpetrated on her mother. In Maloney, the court concluded:

> Whatever may be the situation in other contexts where bystander emotional disturbance claims arise, we are convinced that, with respect to such claims arising from malpractice on another person, . . . "there can be no recovery for nervous shock and mental anguish caused by the sight of injury or threatened harm to another."

Maloney, 545 A.2d at 1063-64.

Other decisions are instructive as to the limitations on liability to bystanders such as the Bouchers. For example, in Villamil v. Elmhurst Memorial Hospital, 529 N.E.2d 1181 (Ill. App. 1st Dist. 1988), the plaintiffs went to the emergency room of Elmhurst Memorial Hospital; the wife was in active premature labor at the time. While the mother was giving spontaneous birth, the attending physician momentarily turned away from the delivery table and the baby fell to the floor on her head and died in the presence of the mother and father.

Under these circumstances, the Villamil court dismissed the cause of action for negligent infliction of emotional distress, holding that:

> Under the [zone-of-danger] rule, a bystander must be in the zone of physical danger to the direct victim created by a defendant's negligent conduct, has had a reasonable fear for his own safety based on a high risk to him of physical impact, and show physical injury or illness as a result of the emotional distress caused by the defendant's negligence.

Villamil, 529 N.E.2d at 1182. See also Jacobs v. Horton Memorial Hosp., 515 N.Y.S.2d 281 (N.Y.A.D. 2 Dept. 1987) (holding that there

was no claim for negligent infliction of emotional distress by a wife whose husband was incorrectly informed he had pancreatic cancer); and Owens v. Childrens Memorial Hospital, Omaha, Neb., 480 F.2d 465 (8th Cir. 1973) (holding that parents were not in child's zone of danger in case of improper diagnosis of child.)

This Court, in adopting the "zone-of-danger" rule, acknowledged that:

> [w]e cannot permit every claim for negligent infliction of emotional distress to go to a jury under such varying standards as each trial judge may choose. We have a practical obligation to articulate understandable standards and to impose workable limits for use in the Utah courts.

Johnson v. Rogers, 763 P.2d 771, 785 (Utah 1988). In adopting Section 313, with its clear limits on recovery, this Court concluded that it is best to take "the more conservative approach and adopt the Restatement rule, as written." Id. Accordingly, recovery is limited to cases involving direct victims and cannot be extended to bystanders such as Mr. and Mrs. Boucher. The wisdom of this conservative approach is emphasized by the California Courts' contradictory and confusing collection of cases.[7]

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[7]In criticizing the varying standards of recovery for negligent infliction of emotional distress, the California Supreme Court has noted that:

> Little consideration has been given in post-Dillon decisions to the importance of avoiding the limitless exposure to liability that the pure foreseeability test of "duty" would create and towards which these decisions have moved.

Thing v. La Chusa, 771 P.2d 814, 821 (Cal. 1989).

(continued...)

C. The Claim Of Torla And James Boucher For Negligent Infliction Of Emotional Distress Fails To Satisfy Even More Liberal Standards Of Recovery.

James and Torla Boucher have urged the adoption of varying standards of recovery for negligent infliction of emotional distress, ranging from "direct victim" liability to contract and foreseeability theories of recovery. They place considerable reliance on several intermediate appellate court cases that predate the governing Supreme Court decision in Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278 (Cal. 1989) and Thing v. La Chusa, 771 P.2d 814 (Cal. 1989). In making these arguments, Bouchers have mistakenly assumed that all of their cited cases and varying authorities are presently accepted standards of recovery from which a plaintiff may pick and choose. Bouchers reliance on outdated California case law is misplaced and in fact serves to substantiate Respondents' arguments herein when reviewed in the context of the most recent California Supreme Court authorities which, like the "zone-of-danger" rule, completely bar any recovery in the instant case, as set forth in detail below.

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[7](...continued)

The Thing Court also noted that "[t]he subtleties in the distinction between the right to recover as a 'bystander' and as a 'direct victim' created what one Court of Appeal had described as an 'amorphous nether realm' and have contributed in some measure to the present difficulty in defining the scope of a [negligent infliction of emotional distress] action." (Citations omitted.) Id. at 823.

1. Mr. and Mrs. Boucher may not recover on either "direct victim" or "contract" theories of recovery.

Appellants James and Torla Boucher assert that they are direct victims of medical malpractice because they are indirectly affected by alleged medical negligence as to their son. In Johnson, supra, this Court noted that a direct victim is a person who is actually within the zone of danger and against whom a duty is breached:

> Plaintiffs who are allowed to recover because they were present within the zone-of-danger are direct victims because the defendant breached the duty of care owed them. Other witnesses falling outside of the zone are denied recovery due to the lack of direct injury and breach of duty.

Johnson, 763 P.2d at 781-82. In this case, the Bouchers were not present within their son's zone of danger, especially where there was no physician-patient relationship between James and Torla Boucher and the health care providers.

In the most recent California decision addressing the issues of contract and direct victim recovery for negligent infliction of emotional distress,[8] the California Second District Court of Appeals held that where a father failed to allege the existence of a psychotherapist-patient relationship with the individual whom he had hired to treat his son, the father was neither a direct victim nor a beneficiary to a contract for the purpose of recovering emotional damages due to negligence. Schwarz v. Regents of the

[8]The Schwarz decision was rendered on December 13, 1990.

University of California, 276 Cal. Rptr. 470 (Cal. App. 2d Dist. 1990).

The Schwarz Court determined that the fact "that a third party [individual other than the victim] thus suffers an adverse consequence does not mean the defendant's conduct is directed at the third party." Schwarz, 276 Cal. Rptr. at 479.

With respect to the contract issue, the Court also determined that:

> when parents arrange for the psychotherapeutic or other medical treatment of their child, the "end and aim" of the contract is to enhance the child's health by ameliorating the condition requiring treatment. While parents assuredly have a great interest in seeing their child's health enhanced, their interest is not united with that of the child. . . . The absence of such closely unified interests tips the balance in favor of nonliability.

Id. at 480.

The Schwarz decision is in part based upon the principles identified in Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278 (Cal. 1989). In Marlene F., three mothers brought their sons to the clinic to obtain counselling for family emotional problems. All of the sons were assigned to the same therapist, who began treating the mother, as well, in each case. The therapist believed the children's emotional difficulties arose partially from problems in the mother-son relationships. Later, the mothers learned the therapist had sexually molested each of their sons during counselling sessions.

The specific circumstances of the case were of prime importance to the court:

> In the present case, the complaint explicitly and expressly alleged that the mothers . . ., as well as the children, were patients of the therapist; specifically, that he "undertook to treat both [mother and son] for their intra-family difficulties by providing psychotherapy to both . . . ." (emphasis added).

Marlene F., 48 Cal.3d at 590-91. In other words, the therapist's tortious conduct was, by its very nature, "directed at" the mother plaintiffs because the therapist treated the mothers directly and the very purpose of the therapy for both mothers and sons was to resolve intra-family difficulties by improving the mother-son relationships. Id.

In reviewing the Marlene F. decision, the Schwarz Court determined that:

> The clear implication [in Marlene F.] is that the court would not have viewed the mothers as "direct victims" had the therapist treated the sons only for the purpose of resolving the sons' individual emotional problems, even if these problems led to family difficulties, rather than treating the parent-child family problems themselves. This conclusion is bolstered by the court's subsequent language in stating: "It bears repeating that the mothers here were the patients of the therapist along with their sons, and the therapist's tortious conduct was accordingly directed at both."

Schwarz, 276 Cal. Rptr. at 477-78.

In summary, the Schwarz Court held that:

> treatment of an ill child is undertaken for the direct benefit of the child, not the parents. . . . We hold that when the negligence is alleged to have occurred during the medical treatment of the child, the defendant's conduct is directed solely at the child. . . and not at the parent who enters into the contract solely as a surrogate for the minor child who otherwise

> could disaffirm it. In sum, the simple existence of a contract between a parent and a medical caregiver to provide medical treatment for a child is not in itself sufficient to impose on the caregiver a duty of care owed to the parent. (Emphasis added.)

Id. at 481.

2. The Bouchers may not recover based upon a foreseeability theory of recovery.

Even assuming arguendo, the expanded theories of recovery of California are applicable in this case, which Respondents strenuously deny, James and Torla Boucher still may not recover for negligent infliction of emotional distress under the facts of the instant case. In Thing v. La Chusa, 771 P.2d 814 (Cal. 1989), the California Supreme Court concluded that limits on recovery for negligent infliction of emotional distress must be imposed:

> Even if it is "foreseeable" that persons other than closely related percipient witnesses may suffer emotional distress, this fact does not justify the imposition of what threatens to become unlimited liability for emotional distress on a defendant whose conduct is simply negligent. Nor does such abstract "foreseeability" warrant continued reliance on the assumption that the limits of liability will become any clearer if lower courts are permitted to continue approaching this issue on a "case-to-case" basis some 20 years after Dillon.

Thing, 771 P.2d at 829.

Based on its experience and distrust in the foreseeability standard of recovery, the California Supreme Court concluded that:

> a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff : (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress -- a reaction beyond that which would be

> anticipated in a disinterested witness and which is not an abnormal response to the circumstances. (emphasis added).

Thing, 771 P.2d at 829-30.

In the instant case, it is undisputed that the Bouchers fail to satisfy the second element in Thing, namely, that they must have been present at the scene of the injury producing event at the time it occurred. Thus, even under more liberal standards, there can be no recovery for negligent infliction of emotional distress in the instant case. As one court has noted:

> There is an element of certainty of injurious impact necessary to establish the requisite sensory perception of the injury-producing event. Put simply, it is the contemporaneous perception of the infliction of injury on a closely related person that causes actionable emotional shock to a third party bystander. Perception of endangerment, while potentially stressful, is insufficient to cause legally cognizable harm, for the stress has not yet ripened into disabling shock. (Citations omitted.)

Hurlbut v. Sonora Community Hospital, 254 Cal. Rptr. 840 (Cal. App. 5th Dist. 1989). In summary, Appellants fail to satisfy any proposed standard of recovery for negligent infliction of emotional distress. Accordingly, the Judgment of Dismissal should be affirmed.

POINT III

> NEITHER UTAH CODE ANNOTATED §§ 78-11-6, 78-11-7 (1953, AS AMENDED) NOR UTAH CONSTITUTION, ARTICLE XVI, SECTION 5 PERMIT TORLA AND JAMES BOUCHER, PARENTS OF DANIEL BOUCHER, TO RECOVER FOR LOSS OF CONSORTIUM WITH THEIR SON DUE TO NONFATAL INJURIES SUFFERED BY HIM.

Appellants, Torla and James Boucher, rely on Utah Code Ann. §§ 78-11-6, 78-11-7 (1953, as amended) and Utah Const. art. XVI,

§ 5 to support their claim that they may recover for loss of society, companionship, and affection (filial consortium) with their son, Daniel Boucher, due to his nonfatal injuries. However, reliance on these provisions is misplaced, and no such claim or cause of action exists in Utah.

Utah Code Ann. § 78-11-7 (1953, as amended) and Utah Const. art. XVI, § 5 pertain only to wrongful death. Accordingly, reliance on Utah Code Ann. § 78-11-7[9] (1953, as amended) and Utah Const. art. XVI, § 5[10] to establish loss of filial consortium damages by parents is inappropriate. In addition, the cases on which Appellants rely, Jones v. Carvell, 641 P.2d 105 (Utah 1982)

[9]Utah Code Ann. § 78-11-7 provides:

> Except as provided in Chapter 1, of Title 35, [Workers' Compensation Act] when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representative for the benefit of his heirs, may maintain an action for damages against the person causing death, or, if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can be maintained for the injury to or death of such person and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section [§ 78-11-6]. In every action under this and the next preceding section [§ 78-11-6] such damages may be given as under all the circumstances of the case may be just.

[10]Utah Const. art. XVI, § 5 provides:

> The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

and Beaman v. Martha Washington Mining Co., 63 P. 631 (Utah 1901),both involve wrongful death. There has never been any dispute as to whether loss of consortium is permitted in wrongful death cases. However, Utah has never permitted claims for loss of consortium in cases involving nonfatal injuries, and plaintiffs have cited no authority to support their position.

A. Utah Code Ann. § 78-11-6 (1953, As Amended) Cannot Be Relied Upon By Appellants To Establish Loss Of Filial Consortium Because Daniel Boucher Was Not A Minor On The Date Of The Alleged Accident.

Utah Code Ann. § 78-11-6 (1953, as amended) provides as follows:

> Except as provided in Chapter 1 of Title 35, [the Workers' Compensation Act] a parent or guardian may maintain an action for the death or injury of a minor child when such injury or death is caused by the wrongful act or neglect of another. Any such action may be maintained against the person causing injury or death, or if such person is employed by another person who is responsible for that person's conduct, also against such other person. (emphasis added).

This provision only permits actions arising out of the death or injury of a minor child. At the time of the incident on June 1, 1987, by plaintiffs' own admission in their appellate Brief, Daniel Boucher was not a minor. He was 18 years of age. Utah Code Ann. § 15-2-1 (1953, as amended) provides that an individual's majority is attained at age 18. Therefore, Appellants' claim that Daniel Boucher's parents are entitled to loss of filial consortium with their nonfatally injured son, who was not a minor at the time of his injury is clearly not supported by Utah Code Ann. § 78-11-6 (1953, as amended). Moreover, it is clear that Utah does not recognize any action for loss of consortium where there has been

nonfatal injury to a spouse, a parent, or a child. In order to fully explain why parents may not recover for loss of consortium with a nonfatally injured child, whether a minor or an adult, it is necessary to review Utah law with regard to loss of consortium nonfatal injuries.

B. Spousal Loss Of Consortium Is Not Permitted For Nonfatal Injuries.

Utah Code Ann. § 30-2-4 (1953, as amended) has been interpreted to mean that no cause of action for loss of consortium between spouses exists in the event of nonfatal injury. This provision provides:

> A wife may receive the wages for her personal labor, maintain an action therefor in her own name, and hold the same in her own right, and may prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried. There shall be no right of recovery by the husband on the account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against third persons for such injury or wrong as if unmarried, and such recovery shall include expenses, medical treatment and other expenses paid or assumed by the husband.

In the case of Hackford v. Utah Power & Light Company, 740 P.2d 1281 (Utah 1987), a wife sought recovery for lost services, society, companionship, advice and conjugal fellowship (consortium) with her husband due to a serious, permanent injury suffered by him. This Court confirmed its prior decisions rejecting recovery by one spouse for nonfatal injury to the other spouse and stated:

> We adhere to our prior decisions and hold that neither spouse has a right to recover for loss of consortium under Utah law.

Id. at 1281.

The Hackford case is only one of a number of cases decided over the years disallowing repeated attempts by a spouse to recover loss of spousal consortium damages when a mate is seriously injured. See, Cruz v. Wright, 765 P.2d 869 (Utah 1988); Gillespie v. Southern Utah State College, 669 P.2d 861, 865 (Utah 1983); Tjas v. Proctor, 591 P.2d 438 (Utah 1979); Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978); Ellis v. Hathaway, 493 P.2d 985 (Utah 1972); and Black v. United States, 263 F. Supp. 470 (D. Utah 1967). Moreover, this Court has not retreated from this position, even though it is one of only three jurisdictions in the United States which does not recognize the right to recover loss of spousal consortium damages for nonfatal personal injuries. See Hackford at 1288.

C. No Recovery Permitted By A Child For Loss Of Consortium With Its Parent.

Likewise, in reviewing Utah law with regard to loss of consortium claims by a child for association with a parent in the event of nonfatal injury to the parent, the federal district court has declined to allow such damages. In coming to this conclusion, the court in Wollam v. Kennecott Corp., 648 F. Supp 160, 163 (D. Utah 1986), announced:

> No authority has been brought to the attention of this court wherein the Utah Supreme Court has dealt with a loss of consortium by a child of an injured party. However, counsel for the plaintiff acknowledged in oral argument that there is little theoretical basis for distinguishing between claims for consortium by a spouse and a child. Accordingly, the Ellis case appears to bar such claims by Justine Wollam, the child of the injured party. Defendant's motion for summary judgment is granted and plaintiff's second and third claims for relief are hereby dismissed.

D. No Recovery Permitted For Loss Of Filial Consortium.

It having been determined that Utah law does not permit an action by a spouse for loss of consortium damages resulting from nonfatal injury to his or her mate, or by a child for a nonfatally injured parent, the same conclusion should be reached with regard to a claim for loss of consortium by a parent with an injured child.

Utah Code Ann. § 78-11-6 (1953, as amended) states that a parent may maintain an action on behalf of a minor child. However, even if Daniel Boucher had been a minor child, this provision cannot support an action for loss of filial consortium. It is confined to allowing a parent to recover the value of lost services and medical expense expended in behalf of the child. (It may also permit a parent to recover the child's general damages in trust or in behalf of the child.)

At common law, it was recognized that a father had a property interest in his childrens' services just as he had a property interest in the services of his servants or his wife.[11] Nevertheless, at least one state which has a statute similar to Utah Code Ann. § 78-11-6 (1953, as amended), has held that such a provision merely codifies the common law right of the parent to recover damages for the loss of services or earnings of the child and medical expenses incurred by a parent in the child's behalf. This jurisdiction also specifically held that such a statute will

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[11]See "Negligent Injury to Family Relationships: A Reevaluation of the Logic of Liability," 77 NW. U.L. Rev. 794 (1983).

not support a parent's action for loss of filial consortium.[12] Although there have been no Utah cases decided directly on point dealing with this issue, Skollingsberg v. Brookover, 484 P.2d 1177, 1178 (Utah 1971) appears to follow this rule when this Court held that a parent was entitled to recover for medical expenses expended in behalf of a nonfatally injured child and for earnings due the child under Utah Code Ann. § 78-11-6 (1953, as amended). General damages were confined to the pain and suffering of the minor child.

At least one member of this Court has suggested that all actions for loss of consortium damages for nonfatal injuries fail to state a claim in Utah. Justice Howe opined that such damages are only proper if the legislature were to first make such a determination. In his concurring opinion, Justice Howe stated:

> I fully agree with majority that if the right to consortium [for nonfatal injuries] is to be given in this state, the proper approach should be for the legislature to do it by modifying the language of § 30-2-4. In doing so, the legislature can give the right to both husband and wife. It can also consider how far that right should be extended to others, such as children who likewise suffer when a parent is tortiously injured . . . . However admirable in the name of justice it is, to attempt to compensate everyone who suffers at the hand of the tort-feasor, boundaries must be drawn . . . the legislature is peculiarly equipped to draw the lines. We are not.

Hackford, 740 P.2d at 1288-89.

Other jurisdictions, although they may allow a parent to recover for loss of services of the child and medical expenses expended on the child's behalf, have refused to allow recovery of loss of consortium damages claimed by a parent for the loss of

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[12]Beerbower v. State, 736 P.2d 596 (Or. App. 1987).

society and companionship with a child when the child has not been fatally injured. In fact, this is the clear majority position among those jurisdictions which have considered the issue.[13]

Appellants in their Brief claim that both Illinois and New York recognize a cause of action for loss of filial consortium. In fact, neither jurisdiction does.[14] The Illinois Supreme Court in Dralle v. Ruder, supra, provides what is probably the most carefully reasoned opinion of any court which has considered the issue as to why loss of filial consortium damages for nonfatal injuries should not be permitted.

In Dralle, the parents argued that because loss of filial consortium damages were permitted in wrongful death actions (as is the case in Utah), such damages should also be permitted in the

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[13]Smith v. Richardson, 171 So. 2d 96 (Ala. 1965); Baxter v. Superior Court of Los Angeles County, 563 P.2d 871 (Cal. 1977); Cimino v. Yale University, 638 F. Supp. 952 (D.C. Conn. 1986); Dralle v. Ruder, 529 N.E.2d 209 (Ill. 1988); Deems v. Western Md. Ry., 231 A.2d 514 (Md. 1967) (dictum); Butler v. Chrestman, 264 So. 2d 812 (Miss. 1972); Wilson v. Lockwood, 711 S.W.2d 545 (Mo. App. 1986); Siciliano v. Capital City Shows, Inc., 475 A.2d 19 (N.H. 1984); Brennan v. Biber, 225 A.2d 742 (N.J. App. 1966), aff'd 239 A.2d 261 (N.J. 1968); Wilson v. Galt, 668 P.2d 1104 (N.M. App. 1983); Gilbert v. Stanton Brewery, Inc., 295 N.Y. 270, 67 N.E.2d 155 (1946); Beyer v. Murray, 306 N.Y.S.2d 619 (1970); Michigan Sanitarium and Benevolent Association v. Neal, 139 S.E. 841 (N.C. 1927); Beerbower v. State, 736 P.2d 596 (Ore. App. 1987); Quinn v. Pittsburgh, 90 A. 353 (Pa. 1914); McGarr v. National and Providence Worsted Mills, 53 A. 320 (R.I. 1902); and Gates v. Richardson, 719 P.2d 193 (Wyo. 1986). In addition, at least one court has held that although it will allow loss of consortium by a parent with a nonfatally injured child, that the parents' action for loss of the child's consortium is limited to the child's minority. See Shockley v. Prier, 225 N.W.2d 495 (Wis. 1975).

[14]Dralle v. Ruder, 529 N.E.2d 209 (Ill. 1988) (this case distinguishes Dymek v. Nyquist, 128 Ill. App. 3d 359, 469 N.E.2d 659 (1984) cited by appellants). See also Beyer v. Murray, 306 N.Y.S.2d 619 (1970) and White v. City of New York, 322 N.Y.S.2d 920 (1970), rejecting plaintiff's filial consortium claims.

case of nonfatally injured children. The Illinois Supreme Court rejected this argument noting that the distinction between a claim for loss of consortium in a wrongful death action and such a claim in a case involving a nonfatally injured child lies in the fact that the living victim retains his or her own cause of action against the tort-feasor. As the court stated:

> Thus, there is no danger that the injury caused by the tort-feasor will go uncompensated or that similar conduct in the future will be undeterred.

Id. at 212.

In addition, the Illinois Supreme Court noted other considerations which convinced it not to extend to parents the right to recover filial consortium damages for nonfatal injuries to their children. These policy considerations are as follows:

1. To recognize claims for loss of society resulting from nonfatal injuries to a child would threaten enlargement of liability. Grandparents, siblings and friends suffering similar losses of society and companionship would also seek to bring claims if recovery were to go unchecked.[15]

2. Permitting both the injured victim and his parents to pursue their own actions would invite duplicate recoveries. In light of the intangible nature of loss of consortium, a trier of fact would find it difficult to distinguish between the child's claim, involving pain and suffering, and the legally distinct but

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[15]Dralle at 210.

factually similar claim by the parents for loss of a child's society and companionship.[16]

3. In order to succeed in an action for loss of filial consortium, the parents of a nonfatally injured child would be required to present evidence of the diminution of their child's society and companionship resulting from the injury. This would entail the difficult task of assigning a monetary value to the reduced value of the parents' relationship with the injured child. At the same time, the defendant would attempt to show the strength of family bonds and greater appreciation for life arising from the child's injury. This parental interest in minimizing the value of the living child would contrast sharply with the situation in a wrongful death action, where the opposite claim is made and loss is presumed.[17]

As the Illinois Supreme Court noted,

> The adoption of that rule [allowing recovery for loss of filial consortium] would thus engender the unseemly spectacle of parents disparaging the "value" of their children or the degree of their affection for them in open court.

Id. at 213.

In addition, because Utah law does not permit damages for the loss of spousal consortium for nonfatal injuries which includes, in addition to service, elements of companionship, felicity and sexual intercourse, if this Court were to permit such damages, it would be placing greater value on the right of association and

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[16]Dralle at 210.

[17]Dralle at 213.

companionship between a parent and a child than between two spouses. In addition, a child is far more dependent upon a parent than a parent upon a child, yet if an action for filial consortium damages were to be recognized, this would place more value on parental association with the child, than the child's association with the parent.

Reben v. Ely, 705 P.2d 1360 (Ariz. 1985) is among those cases cited by Appellants which they claim support a recovery of filial consortium damages. In this case, the Arizona Supreme Court based its holding in favor of allowing filial consortium damages on the grounds (1) that loss of spousal consortium damages were recoverable in situations of nonfatal injury to a spouse and should not be denied to the parents of nonfatally injured children, and (2) that the expansion of liability was within the realm of the judicial, rather than the legislative branch of government. Neither of these arguments are available under Utah law. This Court has repeatedly denied claims for spousal consortium and Justice Howe has opined that the consortium issue is best left to the legislature to decide.

In summary, because plaintiff Daniel Boucher is not a minor, Utah Code Ann. 78-11-6 (1953, as amended) has no application to his parents. Utah Code Ann. § 78-11-7 (1953, as amended) and Utah Const. art. XVI, § 5, both deal with wrongful death, and have no application to the claims of James and Torla Boucher. Even if the Court were to seriously consider permitting loss of filial consortium damages for nonfatal injuries, the concept is fraught with difficulties. As previously noted, (1) common law allowed

parents to recover only for loss of services and medical expenses expended on behalf of a child. This is the most that Utah Code Ann. § 78-11-6 (1953, as amended) accomplishes; (2) permitting filial consortium damages would constitute an invasion of the legislative prerogative; (3) since Utah does not permit a spouse to recover loss of consortium damages for his or her nonfatally injured mate and does not permit a child to recover such damages for his or her nonfatally injured parent, permitting damages for loss of filial consortium would have the anomalous effect of putting a higher value on a parent's association with a child than a spouse's association with his or her mate or than a child's association with a parent; (4) permitting filial consortium damages would justify expansion of similar relief to grandparents, aunts, uncles and friends; (5) allowing filial consortium damages would create the danger of double recoveries or confusing damage awards because of the confusion of the trier of fact between the pain and suffering of the injured child and the parental claim of loss of filial consortium; (6) finally, allowing loss of filial consortium damages would require parents to denigrate or reduce the value of the parent-child relationship in order to maximize recovery whereas in wrongful death actions parents attempt to establish the value of that relationship.

CONCLUSION

Based on the foregoing arguments, the District Court's Order of Dismissal of plaintiff's causes of action for (1) negligent

infliction of emotional distress; and (2) loss of filial consortium should be affirmed in all respects.

DATED this 7th day of February, 1991.

SNOW, CHRISTENSEN & MARTINEAU

By _____
David W. Slagle
Larry R. Laycock
Attorneys for Defendant/
Respondent David W. Moore, M.D.

KIRTON, McCONKIE & POELMAN

By _____
Charles W. Dahlquist, II
Larry R. White
Attorneys for Defendants/
Respondents IHC, Inc., et al.

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ADDENDUM "A"

§ 313. Emotional Distress Unintended

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

zone of danger concept

See Reporter's Notes.

Comment on Subsection (1):

a. The rule stated in this Section does not give protection to mental and emotional tranquillity in itself. In general, as stated in § 436 A, there is no liability where the actor's negligent conduct inflicts only emotional distress, without resulting bodily harm or any other invasion of the other's interests. Such emotional distress is important only in so far as its existence involves a risk of bodily harm, and as affecting the damages recoverable if bodily harm is sustained. See § 903.

b. The rule stated in this Section is unnecessary to make the actor's conduct negligent and, therefore, to subject him to liability if the actor should realize that it involves an unreasonable risk of causing bodily harm in some other manner, such as by immediate impact. As to the effect which is to be given to the fact that the act negligent because otherwise threatening bodily harm results in the harm solely through the effect of the actor's conduct upon the mind or emotions of the other, see § 436.

c. The rule stated in this Section which determines the liability of a person who negligently subjects another to emotional distress likely to cause physical consequences differs from the rule stated in § 312, which determines the liability of one

who intentionally subjects another thereto in one particular. As is stated in Comment *d* under § 312, the actor who intentionally subjects another to emotional distress may under some circumstances take the risk that the other may, unknown to him, have a resistance to emotional strain which is less than that of the ordinary man although characteristic of a recognized minority of human beings. On the other hand, one who unintentionally but negligently subjects another to such an emotional distress does not take the risk of any exceptional physical sensitiveness to emotion which the other may have unless the circumstances known to the actor should apprise him of it. Thus, one who negligently drives an automobile through a city street in a manner likely merely to startle a pedestrian on a sidewalk, is not required to take into account the possibility that the latter may be so constituted that the slight mental disurbance will bring about an illness.

Illustrations:

1. A is employed to drive B to a hospital. He is informed that B is desperately ill. Nonetheless, he drives at a rapid rate of speed and cuts in and out of traffic. He thereby puts B in such fear of a collision that B suffers a serious increase in her illness. A is subject to liability to B.

2. Under the facts assumed in Illustration 1, A would not be liable to B if he had no reason to know of B's illness.

Comment on Subsection (2):

d. The rule stated in Subsection (1) applies only where the negligent conduct of the actor threatens the other with emotional distress likely to result in bodily harm because of the other's fright, shock, or other emotional disturbance, arising out of fear for his own safety, or the invasion of his own interests. It has no application where the emotional distress arises solely because of harm or peril to a third person, and the negligence of the actor has not threatened the plaintiff with bodily harm in any other way.

Thus, where the actor negligently runs down and kills a child in the street, and its mother, in the immediate vicinity, witnesses the event and suffers severe emotional distress resulting in a heart attack or other bodily harm to her, she cannot

recover for such bodily harm unless she was herself in the path of the vehicle, or was in some other manner threatened with bodily harm to herself otherwise than through the emotional distress at the peril to her child.

As to the rule to be applied where the other is so threatened with bodily harm in another manner, and instead suffers emotional distress at the peril or harm of a third person, which results in bodily harm to the other, see § 436.

TOPIC 7. DUTIES OF AFFIRMATIVE ACTION

Scope Note: The duties to take positive action imposed by common law are generally duties to act with reasonable care in order to give to others the aid or protection which the performance of the duty would afford them. The words "reasonable care" are here used to denote that the actor is required to do that which a reasonable man would believe to be necessary to afford the aid or protection to which the other is entitled, but no more.

There are many cases, however, in which the actor deliberately fails to perform a duty which he knows is vital to the security of another. In such case, his misconduct is often either intentional, that is, done for the very purpose of harming the other or with knowledge that harm will certainly result from it (see § 8 A), or is in reckless disregard of the other's interests (see § 500).

This Topic deals with only a part of the situations in which there is a duty of protective action. The duty of maintaining land and structures thereon in safe condition which is imposed upon the possessor and lessor by virtue of their possession or of a covenant to repair is stated in §§ 328 E–379, which deal with the liability of possessors and lessors of land. The duty of careful custody which is imposed upon possessors and custodians of animate and other chattels likely to escape from the place where they are put unless carefully guarded is stated in Volume 3. The duties of inspection and disclosure of the defective condition of chattels which are imposed upon those who use, dispose, or otherwise deal with chattels are stated in §§ 388–408. As to the duties which are imposed by legislative enactment, see §§ 286–288 C. The duty to continue services gratuitously rendered or to perform a gratuitous undertaking and the duty so to control the conduct of third persons as to prevent them from causing bodily harm to others are stated in this Topic.

ADDENDUM "B"

Charles W. Dahlquist, II - A0798
Larry R. White - #3446
KIRTON, McCONKIE & POELMAN
Attorneys for Defendants
IHC Hospitals, Inc., dba
Dixie Medical Center,
Edward Foxley, M.D. and
Kathy Marshall, R.N.
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR

WASHINGTON COUNTY, STATE OF UTAH

DANIEL BOUCHER, by and through his Guardian, TORLA BOUCHER, TORLA BOUCHER, an individual, and JAMES BOUCHER, an individual,	ORDER OF DISMISSAL
Plaintiffs	
vs.	
DIXIE MEDICAL CENTER, a division of IHC Hospitals, Inc., EDWARD FOXLEY, M.D., DAVID MOORE, M.D., KATHY MARSHALL, R.N., and DOES 1 through 20, inclusive,	Civil No. 90-3108
	Judge J. Philip Eves
Defendants.	

The Motion to Dismiss filed by defendants Dixie Medical Center, a division of IHC Hospitals, Inc., Edward Foxley, M.D., and Kathy Marshall, R.N., and the Motion to Dismiss filed on behalf of David Moore, M.D., came on for argument before the Honorable J.

Philip Eves pursuant to notice on May 4, 1990. Plaintiffs were represented by Irwin Zalkin. Defendants, Dixie Medical Center, Foxley and Marshall were represented by Charles W. Dahlquist, II, and the defendant Moore was represented by Larry R. Laycock.

The Court having reviewed the memoranda filed by the parties, having heard oral argument and being fully advised in the premises,

IT IS HEREBY ORDERED as follows:

1. The motions to dismiss of the defendants are granted.

2. Torla Boucher and James Boucher are dismissed as individual parties to this action as to all causes of action contained in the Complaint filed by plaintiffs for the reason they have failed to state a claim or cause of action upon which relief can be granted. More particularly, they have not stated a claim for negligent infliction of emotional distress, loss of consortium with their child, hedonic damage, or any other cognizable cause of action.

3. The Second and Third Causes of Action contained in plaintiffs' Complaint are dismissed for the reason they fail to state a claim or cause of action upon which relief may be granted independent of the First Cause of Action.

4. The defendants Dixie Medical Center, Edward Foxley, M.D., and Kathy Marshall, R.N., are granted twenty (20) days from the date of entry of this order to answer plaintiffs' Complaint.

DATED this 23rd day of May, 1990.

BY THE COURT:

J. Philip Eves
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of May, 1990, I mailed a true and correct copy of the foregoing Order, postage prepaid, to the following:

Attorneys for Plaintiffs
Thomas V. Rasmussen
Hatch, Morton & Skeen
1245 Brickyard Road, Suite 600
Salt Lake City, Utah 84106

Irwin M. Zalkin
1145 Tenth Avenue
San Diego, California 92101

Attorneys for Defendant Moore
David W. Slagle
Larry R. Laycock
Snow, Christensen & Martineau
P. O. Box 45000
Salt Lake City, Utah 84145

Sandra A. Fisher

ADDENDUM "C"

THOMAS V. RASMUSSEN #2693
HATCH, MORTON & SKEEN
Attorney for Plaintiffs
1245 Brickyard Road, Suite 600
Salt Lake City, Utah 84106
Telephone: 484-3000

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

DANIEL BOUCHER, by and through his guardian, TORLA BOUCHER, TORLA BOUCHER, an individual and JAMES BOUCHER, an individual Plaintiffs, vs. DIXIE MEDICAL CENTER, a division of IHC Hospitals, Inc. EDWARD FOXLEY, M.D., DAVID MOORE, M.D., KATHY MARSHALL, R.N. and DOES 1 through 20, inclusive Defendants.	AMENDED CERTIFICATION UNDER RULE 54(b) OF THE UTAH RULES OF CIVIL PROCEDURE Civil No. 90-3108 Judge Philip J. Eves

The Motions to Dismiss filed by Defendants Dixie Medical Center, a division of IHC Hospitals, Inc., Edward Foxley, M.D., and Kathy Marshall, R.N., and the Motion to Dismiss filed on behalf of David Moore, M.D., came on for argument before the Honorable J. Philip Eves pursuant to notice on May 4, 1990. Plaintiffs were represented by Irwin Zalkin. Defendants, Dixie Medical Center, Foxley and Marshall were represented by Charles

W. Dahlquist, II, and the Defendant Moore was represented by Larry R. Laycock.

The Court having reviewed the memorandum filed by the parties, having heard oral argument and being fully advised in the premises,

IT IS HEREBY ORDERED as follows:

1. The Motions to Dismiss of the Defendants are granted.

2. Torla Boucher and James Boucher are dismissed as individual parties to this action as to all causes of action contained in the Complaint filed by Plaintiffs for the reason they have failed to state a claim or cause of action upon which relief can be granted. More particularly, they have not stated a claim for negligent infliction of emotional distress, loss of consortium with their child, hedonic damage, or any other cognizable cause of action.

3. The Second and Third Causes of Action contained in Plaintiffs' Complaint are dismissed for the reason they fail to state a claim or cause of action upon which relief may be granted independent of the First Cause of Action.

4. The Defendants Dixie Medical Center, Edward Foxley, M..D., and Kathy Marshall, R.N., are granted twenty (20) days from the date of entry of this Order to answer Plaintiff's Complaint.

5. A final judgment as to Torla Boucher and James Boucher is hereby entered upon the express determination by the court that there is no just reason for delay.

The above Order as it pertains to Torla Boucher and James Boucher is hereby certified for appeal under Rule 54(b) of the Utah Rules of Civil Procedure.

DATED this 26th day of September, 1990.

BY THE COURT:

J. Philip Eves

J. PHILIP EVES
District Court Judge

CERTIFICATE OF SERVICE

The foregoing Certification Under Rule 54(b) of the Utah Rules of Civil Procedure was hand delivered to David W. Slagle at Snow, Christensen & Martineau at 10 Exchange Place, Eleventh Floor, PO Box 45000, Salt Lake City, Utah 84145; and to Charles Dahlquist, Kirton, McConkie & Poelman at 330 South 300 East, Salt Lake City, Utah 84111 on this 20 day of September, 1990.

Mary G Ballenger

SECRETARY

ADDENDUM "D"

DIAGNOSIS AND SUMMARY RECORD

CODE NO.

[redacted]

NOSIS:

TIONS/PROCEDURES

LICATIONS/INFECTIONS

TIFY THAT THE NARRATIVE DESCRIPTIONS OF THE PRINCIPAL AND SECONDARY DIAGNOSIS AND THE MAJOR EDURES PERFORMED ARE ACCURATE AND COMPLETE TO THE BEST OF MY KNOWLEDGE."

ATTENDING PHYSICIAN SIGNATURE M.D. DATE / /

PATIENT NUMBER 758214-1

MEDICAL RECORDS NUMBE

ROOM – HOSP SERV EMR PT I

OUCHER, DANIEL JAMES | SMOKE | RACE C | PREV. ADM. DATE 1/12/87 | UNDER WHAT NAME BOUCHER, DANIEL J

O BOX 856 | VET | MARITAL STATUS S | REC. HOSPITAL SERVICE IN OTHER HOSPITAL WITHIN LAST 60 DAYS | DATE

VINS, UT 84738 | SEX M | EMP OF PAT/PAR GREEN VALLEY | EMP. #/ OR DEPT.

ADM SRCE | ADM TYPE | DISC. DATE & TIME | ADDRESS OF EMP. | OCCUP. LIFE GUARD

1 6281477 | CLERK | AGE 19Y | DATE OF BIRTH 6/11/68 | CITY STATE ZIP | EMPL STATUS 2 | PHONE NO.

MOORE, DAVID M | CODE 37 | SPOUSES EMP HOMEMAKER | EMP. #/ OR DEPT.

CODE | STREET ADDRESS | OCCUP.

9-35-3145 | REL LDS LATTER DA | NOTIFY CHURCH | CITY STATE ZIP | EMPL STATUS | PHONE NO.

BISHOP/ PASTOR | SPOUSES S.S. NO 529-54-5336

OUCHER, TORLA H | MOTHER | RELATIVE FRIEND ORR, LARRY BROWN | RELATIONSHIP FRIEND

O BOX 856 | STREET ADDRESS BOX 386

VINS, UT 84738 | PHONE 801 6281477 | CITY STATE ZIP IVINS, UT 84738 | PHONE 801 62854

OUCHER, JAMES ALLEN | FATHER | EMP. SELF | NUMBER/ DEPT

O BOX 856 | PHONE 801 6281477 | STREET ADDRESS | OCCUP. DRYWALL CONTR

VINS, UT 84738 | S.S. NO. 530-62-3509 | CITY STATE ZIP | EMPL STATUS 1 | PHONE NO.

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GROUP NUMBER | GROUP WITH | GROUP NUMBER

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ADDENDUM "E"

Thomas Rasmussen, Esq. 2693
HATCH, MORTON & SKEEN
Attorney for Plaintiff
1245 Brickyard Road, Suite 600
Salt Lake City, Utah 94106
Telephone: (801) 484-3000

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50164

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DANIEL BOUCHER, by and through his Guardian, TORLA BOUCHER, TORLA BOUCHER, an Individual, JAMES BOUCHER, an Individual, Plaintiff, vs. IHC INC., doing business as DIXIE MEDICAL CENTER, EDWARD FOXLEY, M.D., DAVID MOORE, M.D., KATHY MARSHALL, R.N., and DOES 1 through 20, Inclusive, Defendants.	COMPLAINT FOR NEGLIGENCE IN THE PROVISION OF HEALTH CARE; MEDICAL MALPRACTICE Civil No. 890906479 PR Judge: JUDGE TIMOTHY R. HANSON

COMES NOW Plaintiffs, Daniel Boucher, by and through his Guardian, Torla Boucher, Torla Boucher, an individual, and James Boucher, an individual, and allege the following against defendants IHC Inc., doing business as Dixie Medical Center, Edward Foxley, M.D., David Moore, M.D., and Kathy Marshall, R.N., and Does 1 through 20, inclusive and each of them as follows:

I

FIRST CAUSE OF ACTION

(NEGLIGENCE IN THE PROVISION OF HEALTH CARE; MEDICAL MALPRACTICE)

1. Due to the incompetence as a result of the mental disability suffered by plaintiff Daniel Boucher, TORLA BOUCHER was appointed the legal Guardian of plaintiff DANIEL BOUCHER.

2. Plaintiff has complied with the Utah Statutory Requirements (78-14-12 U.C.A.) of obtaining a pre-litigation review of the this matter prior to filing this complaint.

3. Plaintiff is unaware of the true names of defendants Does 1 through 20, inclusive, and therefore sues the defendants by such fictitious names; when their true names and capacities have been ascertained by plaintiff, plaintiff will move the court for leave to amend this complaint to set forth their true names and capacities; plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants was in

some manner liable for negligence and other wrongful conduct alleged herein, and for the damages resulting therefrom.

4. At all times herein mentioned each of the defendants named herein was the agent, servant, and employee of each remaining defendant and all of them or in the alternative, was engaged in a general partnership with each remaining defendant, and all of them, or in the alternative, was a joint venturer with each remaining defendant, in doing the acts herein alleged was acting within the course and scope of, and for the benefit of said principal, partnership, employer or joint venturer, and was acting with the full consent and radification of each principal, partner, employer or joint venturer mentioned herein.

5. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, defendant, IHC INC., (hereinafter IHC), is a corporation licensed to do business in, and in accordance with, the law of the State of Utah and is doing business as Dixie Medical Center, (hereinafter Dixie) within and according to the State of Utah or in the alternative is a business enterprise the form of which is unknown.

6. Defendant Dixie is a part of and or a participant in the IHC Group Health Plan and is operated according to the provisions and or under the direction of IHC and is a licensed hospital facility operating for the benefit of the public including the plaintiff herein.

7. Defendants Edward Foxley, M.D., (hereinafter Foxley), David Moore, M.D., (hereinafter Moore) and Kathy Marshall, R.N., (hereinafter Marshall), were at the time of the alleged incident residing in Washington County, Utah.

8. At the time of the alleged incident herein defendants Foxley, Moore and Marshall, and each of them were employed by or in the alternative obtained staff priveleges from defendant Dixie.

9. At all times herein mentioned plaintiff Daniel Boucher, (hereinafter Boucher), was a resident of Washington County Utah.

10. The plaintiff has been informed and believes, and upon such information and belief, alleges that defendant Dixie is authorized and licensed to conduct and did conduct, operate, manage and control a hospital (a general or community hospital) in St. George, Utah, known as Dixie Medical Center, to which members of the general public, including the plaintiff herein were invited as patients.

11. At the time of the alleged incident herein and at the time of the filing of this lawsuit, defendant Dixie was and is a hospital licensed to do business in the City of St. George, Utah, and operates pursuant to the provisions or direction of defendant IHC a Utah corporation with its principal place of business in Salt Lake City, Utah.

12. On or about June 3, 1987, the time of the alleged incident herein, the defendants Foxley, Moore and Marshall, and each of them were physicians and surgeons or nurses licensed by the State of Utah in medicine and surgery or nursing care in said State and all of whom were engaged in a patient physician/nursing relationship with plaintiff Boucher on or about the aforementioned date.

13. At all times relevant to the allegations herein, the defendants Foxley, Moore and Marshall, and Does 1 through 20, held themselves out to possess and exercise that degree of skill learning ability and expertise possessed and exercised by similar medical practioners and nurses in the County of Washington and the State of Utah.

14. On June 1, 1987, plaintiff Boucher sustained an injury to the right hand for which defendant Moore performed surgical repair at defendant Dixie hospital on the morning of June 2, 1987. The surgery was uneventfull and the results unremarkable. During the course of the post-operative recovery period plaintiff Boucher received infusions of Morphine in excess of 100 mg. in addition to Versed, Valium, and Fentanyl which caused plaintiff to become heavily sedated. Immediately after midnight of June 2, 1987, in the early a.m. hours of June 3, 1987, plaintiff Boucher was noted to be experiencing stertorus breathing and by 4:20 a.m. was unarouseable.

15. Prior to obtaining patient plaintiff Boucher's consent to perform hand surgery, defendant Moore failed to warn plaintiff of any risks inherent in or attendant to post-operative recovery and or the infusion of Morphine alone or in combination with Versed, Valium and Fentanyl.

16. At all times mentioned herein the defendants IHC by and through their agents and or employees and each and everyone of the remaining defendants, Dixie, Foxley, Moore and Marshall, Does 1 through 20, and each of them, failed to properly monitor the patient, plaintiff Boucher, and furthermore failed to take timely and appropriate remedial action when the patient plaintiff, was first observed to be experiencing respiratory difficulties. The patient was observed at 4:20 a.m. to be suffering from the effects of severe hypoxia which subsequently led to severe brain damage and spastic quadraplegia.

17. At all times mentioned herein, the defendants IHC by and through their agents and or employees and each and everyone of the remaining defendants, Dixie, Foxley, Moore and Marshall, Does 1 through 20, and each of them, failed to timely call for the assistance of a physician and when called defendant Moore did not respond in a timely or appropriate manner and further defendant Foxley refused to respond and as such defendants Moore and Foxley failed to timely perform procedures which may have served to decrease the brain damage and extent of spasticity

suffered by the plaintiff.

18. As a further direct and proximate result of the aforementioned negligence and breach of the professional standard of care (professional malpractice) of the defendants and each of them the plaintiff patient was rendered in a comatose state for a period of approximately ten (10) days and upon his emergence therefrom he discovered that he had sustained visual and speech impairments, memory loss, loss of knowledge, decreased learning ability, lack of ability to recognize family members or friends, that he was incontinent of bowel and bladder, that he was unable to voluntarily move any of his extremeties in that he was imprisoned by the confines of his own body, the discovery of which all led to his suffering severe emotional distress, fright, anxiety, and mental suffering.

19. As a direct and proximate result of the aforesaid negligence of the defendants and each of them in failing to properly monitor and take timely emergency action the plaintiff, Boucher, suffered severe hypoxia and as a result of that oxygen deprivation became brain damaged and a quadraplegic.

20. As a further direct and proximate result of the aforementioned negligence and breach of the professional standard of care (professional malpractice) of the defendants and each of them the plaintiff has incurred hospital and medical expenses, requires extraordinary care-taking, living expenses,

rehabilitation expenses and in addition will need future life time care and supervision, rehabilitation, and medical care, in an amount exceeding One Hundred Thousand Dollars, ($100,000.00).

21. As a further direct and proximate result of the aforementioned negligence and breach of the professional standard of care (professional malpractice) of the defendants and each of them the plaintiff has sustained loss of memory, loss of communicative skills, diminished visual capacity, a loss of previously acquired knowledge and skills, and a loss of 45 IQ points to the below normal range.

22. As a further direct and proximate result of the aforementioned negligence and breach of the professional standard of care (professional malpractice) of the defendants and each of them the plaintiff has suffered economic and wage loss and has suffered injury to his earning capacity which is permanent and in an amount which has not yet been completely ascertained but in excess of One Hundred Thousand Dollars, ($100,000.00).

23. In addition, as a direct and proximate result of the aforementioned negligence and breach of the professional standard of care (professional malpractice) of the defendants and each of them plaintiff has suffered severe emotional and mental distress and loss of enjoyment of his life pursuits.

II

SECOND CAUSE OF ACTION

(NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS)

For a separate and distinct Cause of Action against the defendants and each of them plaintiffs Torla and Boucher incorporate by reference herein in full paragraphs 1 through 23 of the First Cause of Action and further allege:

24. At all times mentioned herein the defendants IHC by and through their agents and or employees each and every of the remaining defendants, Dixie, Foxley, Moore and Marshall, Does 1 through 20, and each of them, knew or should have known that their failure to perform according to the standards of their profession as defined by their community, as herein-above alleged, would result in severe emotional distress and suffering to the parents of Daniel Boucher, Torla Boucher and James Boucher.

25. As a proximate result of the negligence of defendants and Does 1 through 20, and each of them, plaintiffs Torla Boucher and James Boucher have suffered severe emotional and mental distress, and have lost the comfort, protection, and society of their son. The amount of said damages are unknown at this time. Plaintiffs will seek leave to amend this complaint according to proof.

III

THIRD CAUSE OF ACTION

(NEGLIGENT IMPAIRMENT OF QUALITY OF LIFE)
HEDONIC DAMAGES

For a separate and distinct Cause of Action against the defendants and each of them plaintiff Boucher realleges each and every allegation contained in paragraphs 1 through 22 of the First Cause of Action.

26. At the time of admission of patient plaintiff Boucher to defendant Dixie's hospital, Boucher was enlisted in the Utah Army, National Guard and his goal was to transfer to the Air Force and become a pilot. He had been working as a stock clerk and previously employed as a life guard. He was a good to above average student who participated in drama and other school activities in addition to recreational sports such as skiing, swimming, football and baseball and socially interacted with numerous male and female friends.

27. As a further direct and proximate result of the aforementioned negligence and breach of the professional standard of care (professional malpractice) of the defendants, and each of them, the plaintiff Boucher has suffered an impaired quality of life in that he can no longer learn and acquire knowledge to the extent his previous IQ of 130 points would have allowed him; is

no longer able to communicate or interact in a social manner at the level he was once able to conduct himself; he has no career potential nor has he the ability to acquire any employable economic skills. The appropriate amount of damages for this cause of action have not yet been ascertained. Plaintiffs will seek leave to amend according to proof.

WHEREFORE, plaintiff Daniel Boucher respectfully prays for judgment against the defendants IHC, Dixie, Foxley, Moore and Marshall, and Does 1 through 20, inclusive, and each of them, for all Causes of Action, as follows:

1. For General Damages according to proof at trial;

2. For Special Damages according to proof at trial;

3. For costs of suit incurred herein; and

4. For such other and further relief as the court may deem just and proper.

DATED: October 25, 1989

HATCH, MORTON & SKEEN

Thomas Rasmussen

THOMAS RASMUSSEN,
Attorney for Plaintiff,
DANIEL BOUCHER

CERTIFICATE OF SERVICE

We do hereby certify that on the 4th day of February, 1991, we caused four (4) true and correct copies of the Brief of Respondents IHC Hospitals d/b/a Dixie Medical Center and David Moore, M.D., to be served upon the following:

Thomas V. Rasmussen, Jr., Esq.
Attorney for Plaintiffs
HATCH, MORTON & SKEEN
1245 Brickyard Road, Suite 600
Salt Lake City, Utah 84106

Erwin M. Zalkin, Esq.
Attorney for Plaintiffs
1145 Tenth Avenue
San Diego, California 92101

SNOW, CHRISTENSEN & MARTINEAU

By _____
Larry R. Laycock

KIRTON, McCONKIE & POELMAN

By _____
Larry R. White

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